TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 736

WONG DOO, PETITIONER,

vs.

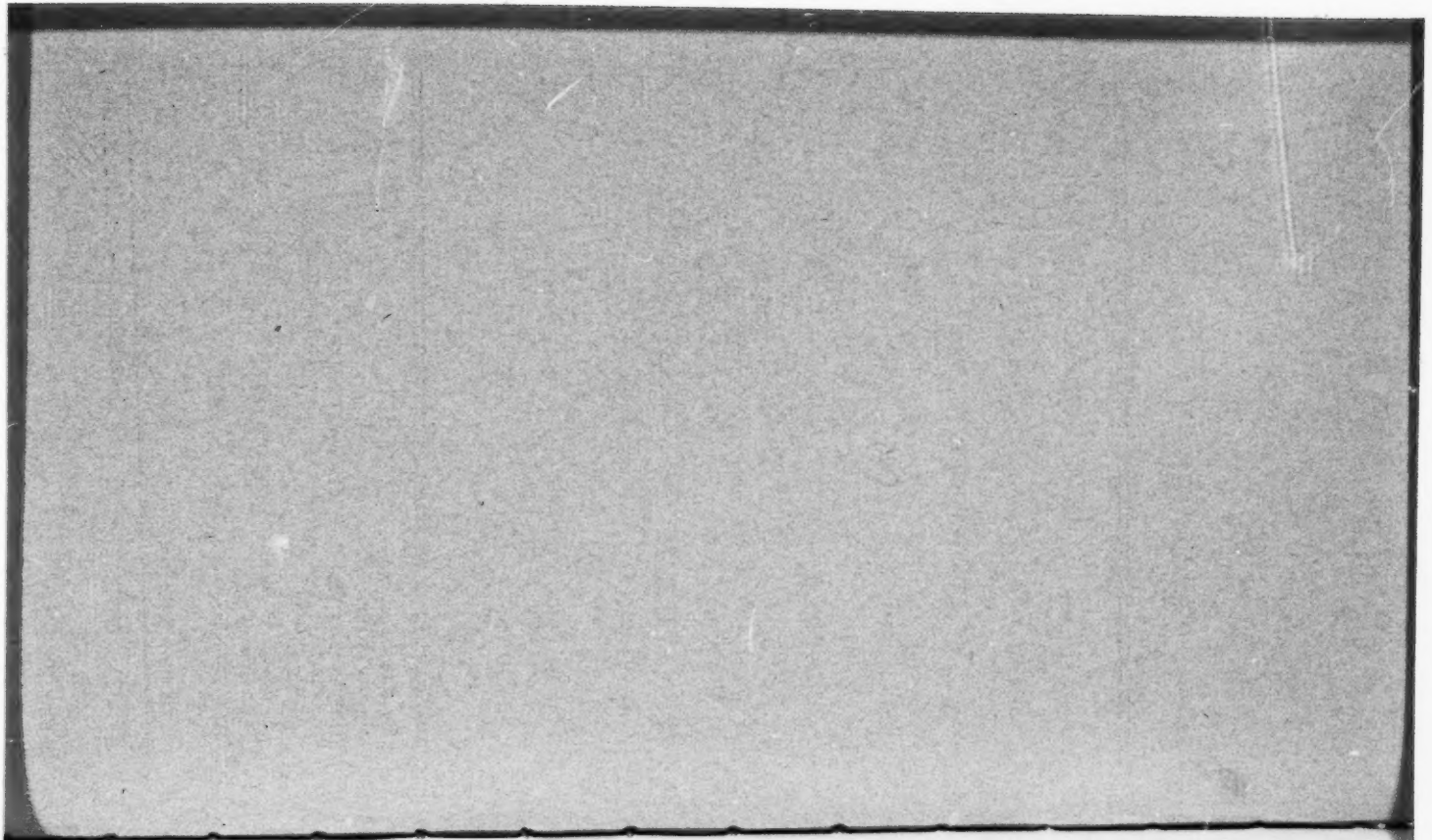
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 9, 1924

ORDER GRANTING CERTIORARI FILED FEBRUARY 18, 1924

(30,046)



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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1924

[fol. 1] Caption omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF CERTIORARI—Filed Aug. 8, 1922

To the Honorable the District Court of the United States in and for the Northern District of Ohio:

First. Petitioner herein, Wong Doo, says that he is the son of Wong Sun, and that he came to the United States on or about January 25, 1915, receiving admission at San Francisco as the minor son of Wong Sun, a Chinese merchant; that since April, 1915, after residing in San Francisco, California, and pursuing his studies as a student, he has been a resident of the City of Cleveland, County of Cuyahoga and State of Ohio, in the District and Division aforesaid, and within the jurisdiction of this Court and at all times since his residence in Cleveland he has followed his studies as a student and is lawfully entitled to remain in the United States at the present time.

Second. Said petitioner is now actually imprisoned and restrained of his liberty and detained, by color of the authority of the United States in the custody of J. A. Fluckey, Esquire, Inspector in Charge of the Immigration Service of the Department of Labor of the United States of America at Cleveland, Ohio, in the district and division aforesaid, and within the jurisdiction of this Court.

Third. The sole claim and sole authority by virtue of which the said J. A. Fluckey, Immigration Inspector as aforesaid, so restrains and detains said petitioner is a certain paper which purports to be a warrant, in writing, which in substance orders the arrest of this petitioner under the alleged authority of Section 19 of the Immigration Act of February 5, 1917, for the alleged violation of the Chinese-Exclusion Laws, in that: "That he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes." Said order being signed by the Secretary of Labor. And, the petitioner being further held in custody by the said J. A. Fluckey, under color of an order of deportation, the exact nature of which this petitioner is unable to more particularly describe than it is based upon said warrant herein referred to and the proceedings hereinafter set forth.

[fol. 3] Fourth. Petitioner says that his father, Wong Sun, at the time of his admission to the United States as a son of a domiciled merchant was a bona fide member of the merchant firm of Chong Lee and Company in San Francisco and had complied with the Chinese-exclusion laws and all other laws of the United States in every respect at the time of his admission as a merchant, and

was such at the time this petitioner was admitted into the United States; that petitioner's father, Wong Sun, resided with petitioner in San Francisco from January 25, 1915, until April, 1915, pursuing his calling of a merchant with Chong Lee & Company, and that in April, 1915, Wong Sun with the petitioner came to Cleveland at the instance of Chong Lee & Company to obtain a new business location and branch store for this firm and with the understanding that petitioner was to follow his studies as a student.

Fifth. Said petitioner herein says that on August 3, 1915, he together with his father, Wong Sun, and Wong Fee, were temporarily residing at a Chinese laundry in Cleveland, Ohio, and were apprehended for examination and taken into custody by officers of the Immigration Department without any warrant or authority in law; that a witness, to-wit: one Mack, was asked questions and gave answers without being sworn, which questions and answers constituted part of the basis for the order of deportation and warrant herein; that sundry witnesses were examined in English without this petitioner's being able to understand the questions and answers; that petitioner's possessions were searched and appropriated, particularly his papers without warrant or authority of law and against his will.

Petitioner says that an application for a writ of habeas corpus based solely upon jurisdictional grounds was applied for and upon hearing denied by this Honorable Court and the United States Circuit Court of Appeals but petitioner says that at said hearing none of the questions herein raised were considered or before either of said courts.

Petitioner says that at the preliminary hearings he was not represented by counsel and had no opportunity for obtaining representation: that at the preliminary hearings the interpretation of the Chinese testimony by the said interpreter was imperfect; that after the warrant of arrest was issued for petitioner witnesses were examined in the absence of his counsel and petitioner's absence without [fol. 4] his opportunity of cross examining them and that said testimony so taken, together with the unsworn statements of two doctors and one white witness were made a part of said record and said proceedings.

Sixth. Said petitioner further says that the hearing of his case and his father, Wong Sun, and his brother, Wong Fee, and that of another Chinese Chan Yim, were combined to the prejudice of this petitioner and the procedure had in all four cases was made a part of the record of said proceedings against this petitioner.

Seventh. Petitioner further says that the Department of Labor drew an erroneous conclusion of fact and erroneous conclusions of law from such facts as were presented in this: That it charged the father of this petitioner, Wong Sun, with having obtained admission into the United States by fraud, and that the aforesaid Wong Sun was not a domiciled merchant and returning as such, whereas, in truth and fact Wong Sun at said time and at the time

of petitioner's admission was a properly domiciled merchant as is borne out by the hearings of the department itself in respect thereto and not contradicted by any evidence produced at any of the hearings reasonably considered; that the evidence all being to the effect that Wong Sun re-entered the United States in 1914 rightfully as a domiciled merchant returning in accordance with the provisions of the rules and regulations of the Immigration Department. The fact that this petitioner having been admitted as the son of such domiciled merchant should afterwards be found with his father in a laundry, almost a year having elapsed since his entry, would as a matter of law not affect the legality of this petitioner's entry into the United States, or his continuing here thereafter and for the reason that the Department of Labor determined the law to be otherwise it erred in this respect:

Eighth. Said petitioner further says that in the proceedings before the Department of Labor certain documents and exhibits and other papers were offered and admitted in evidence against the petitioner herein, over his objections, and each of which, under the statutes of the State of Ohio, and of the United States and of the constitution of the United States were improperly taken from the place where petitioner was apprehended were so admitted to the prejudice of the petitioner.

[fol. 5] Ninth. Said petitioner herein further says that there is no competent or proper evidence before said Department of Labor to show that said petitioner was subject to removal or deportation or guilty of any of the charges or violations set forth in said warrant, or to show that said Department of Labor of the United States had any jurisdiction over the petitioner whatsoever.

Tenth. Petitioner further says that he is entitled to be and remain in the United States and is not subject to deportation either under the Immigration Act of February 5, 1917, or the Chinese-exclusion Acts and that he is now in the custody of said J. A. Fluckey without any legal authority whatsoever to be deported to China at the earliest possible moment.

Eleventh. Petitioner further alleges that he does not have and is unable to procure a full and complete copy of the record of the proceedings had before the Department of Labor in his case, together with the exhibits which were made a part thereof but that he is filing with the Court so much of the record as is in his possession under separate cover and marked "Exhibit A" said record being of the cases of Wong Sun, Wong Fee, Chan Yim and himself; that the record filed herewith and marked for identification "Record in the cases of Wong Sun, Wong Doo, Wong Fee and Chan Yim" be made a part hereof by reference.

Wherefore, said petitioner herein prays that a writ of habeas corpus may issue, directed to the said J. A. Fluckey, Inspector in Charge at Cleveland, Ohio, of the Immigration Service of the De-

partment of Labor of the United States and to each and all of his deputies requiring him and them to bring and have said petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of said petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue, directed to the said J. A. Fluckey as Immigration Inspector in Charge, to certify to this Court all the proceedings that took place and all of the evidence, reports, recommendations, correspondence and documents of whatsoever nature, which were in possession of or used or examined by or offered before the Department of Labor in the proceedings which resulted in the order of deportation in the case of the said pe-
[fol. 6] titioner herein and that all of the same be filed herein and made a part of this petition; and that this Court may issue a writ of habeas corpus to the said J. A. Fluckey; that your petitioner be discharged from said illegal restraint and for all other relief to which by reason of the premises he may be entitled.

Wm. J. Dawley, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by Wong Doo omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF HABEAS CORPUS—Entered August 8, 1922, by D. C. Westenhaver, Judge

This cause came on to be heard on the application of Wong Doo for a writ of habeas corpus and the Court being advised in the premises, it is ordered that an alternative writ issue as prayed for in the application, returnable Friday, August 11th, 1922.

[fol. 7] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS WITH RETURN—Filed Aug. 11, 1922

[Title omitted]

To J. A. Fluckey, Esquire, Inspector in Charge, of the Immigration Service of the Department of Labor of the United States of America, Cleveland, Ohio:

We command you that the body of Wong Doo, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before me, D. C. Westenhaver, Judge of our District Court of the United States, within and for the Division and District aforesaid on Friday, August 11, 1922, at 9:30 A. M. to do and receive all and singular those things which the said D. C.

Westenhaver, Judge of our said District Court, shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable D. C. Westenhaver, Judge, U. S. District Judge, Northern District of Ohio, this 8th day of August, A. D. 1922.
Attest:
B. C. Miller, Clerk, by C. A. Wilder, Deputy. (Seal.)

U. S. Marshal's Return

Received this writ at Cleveland, Ohio, Aug. 8, 1922, and on Aug. 10, 1922 at the same place, I served it on the within named J. A. Fluckey by delivering to him personally, a true and certified copy hereof, with all endorsements thereon.
Geo. A. Stauffer, U. S. Marshal. A. L. Gibson, Deputy.

Marshal's Fees

Travel	6
Service	2 00
	2 06

[fol. 8] IN UNITED STATES DISTRICT COURT

RETURN OF J. A. FLUCKEY—Filed Aug. 29, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Your respondent, J. Arthur Fluckey, respectfully represents to the Court that he is and was at the time mentioned in the application for a Writ of Habeas Corpus the Inspector in Charge, at Cleveland, Ohio, of the Immigration Service of the Department of Labor of the United States, and that as such officer, in his official capacity, he is holding the petitioner, Wong Doo, in the above entitled case, under and by virtue of a certain warrant for the arrest of said petitioner, duly issued to respondent, J. Arthur Fluckey, Inspector in Charge, Cleveland, Ohio, or to any Immigrant Inspector in the service of the United States, a copy of said warrant, issued by John W. Abercrombie, Acting Secretary of Labor on the 27th day of March, 1918, being attached hereto and marked "Exhibit A"

Your respondent further says that pursuant to said warrant of arrest, the petitioner herein was taken into custody and granted a full and fair hearing in compliance with the immigration act of February 5, 1917, and the rules and regulations thereunder, that the said petitioner was represented throughout the hearing by counsel, that petitioner and counsel were afforded an opportunity to inspect the warrant of arrest and all the evidence theretofore and thereafter taken in the matter, and an opportunity to submit a brief of which

latter opportunity they did not avail themselves, and that after the submission of the complete record and exhibits by respondent to the Secretary of Labor, and a full consideration thereof by the appropriate officials of the Department of Labor, a warrant of deportation was duly issued by Louis F. Post, Assistant Secretary of Labor on the 15th day of June, 1920, a copy of which is attached hereto, and marked "Exhibit B."

Your respondent further says that on or about August 3, 1915, the petitioner, Wong Doo, was found residing in a laundry at No. 12100 St. Clair Avenue, Cleveland, Ohio, by regularly appointed officials of the Immigration Service of the Department of Labor engaged in the discharge of their lawful duties, that said petitioner was taken into custody and questioned and that a record of all questions was made and transmitted to the Secretary of Labor; that certain letters [fol. 9] and papers written in the Chinese language were found in the laundry aforesaid, which, together with other evidence established the fact that Wong Doo, the petitioner herein, was a laborer, notwithstanding his claim that he was and had been the minor son of a merchant within the meaning of Rule 9, Chinese rules, and of the decision of the Supreme Court on which said rule is based, and notwithstanding he entered the United States at the port of San Francisco, California, on the 25th day of January, 1915, ostensibly as the minor son of a Chinese merchant, to-wit, as alleged son of Wong Sun, Petitioner No. 11569 in these proceedings, and was granted a certificate of identity (No. 18563). Whereupon the petitioner was arrested pursuant to a warrant issued on August 9, 1915, by J. B. Densmore, Acting Secretary of Labor, under the act of February 20, 1907, which charged that said petitioner had been found within the United States in violation of Rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based having secured admission on the claim of being the minor son of a member of the exempt classes, but having become a laborer since admission. Under that warrant the petitioner was granted a full and fair hearing on the matters and things involved in the said warrant of arrest, the petitioner being present during the hearing and represented by counsel who with petitioner had full opportunity to inspect and make a copy of the minutes of the hearing and to offer evidence to meet any evidence previously or subsequently presented by the Government, and had full opportunity to show cause why he should not be deported. Your respondent says that the hearing was held in good faith, that there was no abuse of discretion lodged by law in the Secretary of Labor, that the said hearing was had in accordance with the law and regulations of the Department then applying, and that after due consideration of the record of said hearing, the exhibits appended thereto, and the brief of counsel, the honorable W. B. Wilson, Secretary of Labor, on April 5, 1916, issued his warrant for the deportation of said petitioner to China.

Whereupon your respondent took the said petitioner into custody and in due course a Writ of Habeas Corpus (No. 9308) was granted by this Honorable Court discharging the petitioner from custody

solely because of the decision of the Supreme Court of the United States in a similar case that the Secretary of Labor did not have au-
[fol. 10] thority under the Act of February 20, 1907, to deport Chinese aliens from the United States in the manner provided in said act for violation of the Chinese exclusion acts of the United States.

Thereafter, on or about the second day of April, 1918, your respondent took the said petitioner into custody under the warrant of arrest hereinbefore described as "Exhibit A," based upon identically the same evidence and containing substantially the same charges as in the previous proceedings except that the warrant was issued on the 27th day of March, 1918, pursuant to the immigration act of February 5, 1917, which act was passed by Congress as a substitute for the Act of February 20, 1907. Under this warrant the petitioner was granted a due hearing as hereinbefore set forth, and pursuant to a warrant of deportation, as per "Exhibit B" attached, was taken into custody for deportation to China; whereupon the said petitioner applied to this Honorable Court for a Writ of Habeas Corpus (No. 10487) representing that the Secretary of Labor was not clothed with authority to deport the said petitioner from the United States in the manner provided by the said immigration act of February 5, 1917, for violation of the Chinese-exclusion Acts of the United States, and upon hearing before this Honorable Court and being remanded to your respondent for execution of the order of the Secretary of Labor, appealed to the Circuit Court of Appeals, Sixth Circuit, which appeal was dismissed in due course by said Honorable Court (No. 3577).

And finally your respondent says that at all times the petitioner herein has been dealt with in a just and honorable manner by the Secretary of Labor, by your respondent and his subordinates, having been granted numerous continuances and considerations.

Your respondent denies each and every allegation of the petition except those which have been specifically admitted, and alleges that the said petitioner is now held in lawful custody by your respondent, J. Arthur Fluckey, under and by virtue of the said warrants of arrest and deportation and instructions as aforesaid.

Wherefore, your respondent prays that he may be allowed to go hence with the body of the petitioner, Wong Doo.

J. Arthur Fluckey, Inspector in Charge.

[fol. 11] Jurat showing the foregoing was duly sworn to by J. A. Fluckey omitted in printing.

EXHIBIT "A" TO RETURN

United States of America

Department of Labor

Washington

Bureau of Immigration

Form 8 C

Warrant—Arrest of Alien

No. 53943/21

To J. A. Fluckey, inspector in charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Wong Doo, who landed at the port of San Francisco, Cal., ex SS. "Siberia," on the 25th day of January, 1915, is subject to be taken into custody and returned to the country where he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of the law of the United States, to-wit, the Chinese-exclusion law, for the following among other reasons:

That he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

I, John W. Abercrombie, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

[fol. 12] The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation: "Expenses of Regulating Immigration, 1918." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $2,000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 27th day of March, 1918.

(Signed) John W. Abercrombie, Acting Secretary of Labor.

(Seal.) JJK.

EXHIBIT "B" TO RETURN

United States of America

Department of Labor

Washington

Bureau of Immigration

Form 8 D

Warrant—Deportation of Alien

No. 53943/21. Incl. No. 3989

To Edward White, Commissioner of Immigration, Angel Island Station, San Francisco, California:

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Joseph Francis, held at Cleveland, Ohio, I have become satisfied that the alien Wong Doo, who landed at the port of San Francisco, California, ex SS. "Siberia," on the 25th day of January, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese-exclusion law, in that:

He has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to the country whence he came, at the expense of the steamship company importing him.

[fol. 13] For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of June, 1920

(Signed) Louis F. Post, Assistant Secretary of Labor. (Seal.)

IN UNITED STATES DISTRICT COURT

HEARING ON PETITION—Entered Sept. 8, 1922, by D. C. Westenhaver, Judge

This day this cause came on to be heard on the application for a writ of habeas corpus, and was argued by counsel, submitted to the Court and taken under advisement by the Court.

In United States District Court

Hearing on Application for Leave to File Amended Return—Entered Sept. 15, 1922, by D. C. Westenhaver, Judge.

This cause having been submitted to the Court on a previous day of this term upon an application for a writ of habeas corpus and before decision thereof, the United States Attorney requested leave of the Court to file an amended return herein, the petitioner objected [fol. 14] to the granting of said leave and the Court, being advised in the premises, overruled the objection of the petitioner and granted leave to the United States Attorney to file his amended return herein instanter; to the granting of which leave the petitioner, by his attorney, excepts.

In United States District Court

Amended Return—Filed Sept. 15, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Now comes J. Arthur Fluckey, Inspector in Charge of the Immigration Service of the Department of Labor of the United States at Cleveland, Ohio, respondent in the above entitled cause and leave of court having been first obtained, files this his amended return herein.

Your respondent says that he is holding the petitioner Wong Doo under and by virtue of a certain warrant for the arrest of said Wong Doo duly issued to respondent, or to any immigrant inspector in the service of the United States, by John W. Abercrombie, Acting Secretary of Labor, on the 27th day of March, 1918, a copy of which warrant of arrest is hereto attached and marked Exhibit "A."

The respondent further says that pursuant to the said warrant of arrest the petitioner was taken into custody and granted a full and fair hearing in compliance with the Immigration Act of February 5, 1917 and the rules and regulations promulgated thereunder; that petitioner was represented by counsel throughout the hearings held subsequent to the issuance of said warrant of arrest; that petitioner and his counsel were afforded an opportunity to inspect said warrant of arrest and all evidence theretofore and thereafter taken in the [fol. 15] matter and that after the submission of the complete record and the exhibits by the respondent to the Secretary of Labor and a full consideration thereof by the appropriate officials of the Department of Labor, a warrant ordering the deportation of the petitioner herein was duly issued by Louis F. Post, Assistant Secretary of Labor, on the 15th day of June, 1920, a copy of which warrant of deportation is hereto attached and marked Exhibit "B." Your respondent denies each and every other allegation in the petition contained not herein specifically admitted to be true.

Further answering, your respondent respectfully represents to the Court that on the 29th day of June, A. D., 1920, Wong Doo, the petitioner herein, filed his application for a writ of habeas corpus in the District Court of the United States for the Northern District of Ohio, Eastern Division, Docket Number of said case being 10487 Law; that said application set forth the issuance of the warrant for the arrest of said Wong Doo by John W. Abercrombie, Acting Secretary of Labor, on the 27th day of March, 1918, and also issuance of the warrant for the deportation of said Wong Doo by Louis F. Post, Assistant Secretary of Labor, on the 15th day of June, 1920; said application so filed in behalf of said Wong Doo on June 29, 1920 also contained the allegation that the hearings conducted before your respondent were manifestly unfair and not impartial to said Wong Doo, but that the petitioner was examined on several occasions by your respondent and his assistants without the privilege of counsel and found by respondent to be unlawfully in the United States, solely from the testimony of witnesses, cross examination of whom was not had by petitioner's counsel.

Your respondent says that on July 1st, 1920, an alternative writ of habeas corpus was issued to your respondent out of this Honorable Court; that thereafter a return was filed in behalf of your respondent denying the material allegations of the application theretofore filed in behalf of said Wong Doo and alleging that the hearings had before respondent as to the deportation of the petitioner therein were conducted in accordance with law and the regulations of the Department of Labor and that the issuance of the warrant of deportation thereafter constituted no abuse of discretion on the part of the Secretary of Labor; that issues having been joined, the cause was heard before this Honorable Court on November 3, 1920, [fol. 16] and that on December 14, 1920, a final decree denying the application of said Wong Doo for a writ of habeas corpus was entered by this Honorable Court.

Your respondent further says that thereafter an appeal from said final decree was taken by the petitioner herein to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; that the record of the proceedings in said case No. 10487 and briefs in behalf of the petitioner and of your respondent were duly filed in said Circuit Court of Appeals and the cause was thereafter argued orally by counsel to said Circuit Court of Appeals and that on or about the 28th day of June, A. D., 1922, said cause was decided by said United States Circuit Court of Appeals for the Sixth Judicial Circuit and the judgment of this Court denying the application of said Wong Doo for a writ of habeas corpus, was by said Circuit Court of Appeals affirmed and a mandate thereunder was filed on or about the 3rd day of August, 1922. A copy of the transcript of the record before the United States Circuit Court of Appeals in said proceeding is hereto attached and marked Exhibit "C."

Your respondent therefore says that any and all rights of the petitioner herein to a writ of habeas corpus have been fully and completely determined by this Honorable Court and the Circuit Court of Appeals for the Sixth Judicial Circuit.

Wherefore, your respondent prays that the petition herein be dismissed and that he may be allowed to go hence with the body of the petitioner Wong Doo.

J. Arthur Fluckey, Inspector in Charge.

Jurat showing the foregoing was duly sworn to by J. A. Fluckey omitted in printing.

[fol. 17] EXHIBIT "A" TO AMENDED RETURN—Omitted; printed side page 11 ante

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[fol. 18] EXHIBIT "B" TO AMENDED RETURN—Omitted; printed side page 12 ante

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[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE REPLY INSTANTER—Entered Sept. 18, 1922, by D. C. Westenhaver, Judge

In this cause leave is hereby given the petitioner to file his reply to the amended return herein instanter, and said reply is accordingly filed.

IN UNITED STATES DISTRICT COURT

REPLY—Filed Sept. 19, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Now comes Wong Doo, the petitioner in the above entitled matter, leave of court having been first obtained, and replying to the Amended Return of J. Arthur Fluckey, Inspector in Charge of the Immigration Service of the Department of Labor of the United States, at Cleveland, Ohio, says that he admits that on the 29th day of June, A. D. 1920, the petitioner herein filed his application for a writ of habeas corpus and that the petition contained substantially the allegations set forth in respondent's amended return; that on July 1, 1920, an alternative writ of habeas corpus was issued out of this Honorable Court and that, thereafter, a return was filed as set forth in respondent's Amended Return and that the case was heard before this Honorable Court on November 31, 1920, and that on December 14, 1920, a final decree was entered by this Honorable Court denying the application of Wong Doo for

a writ of habeas corpus, from which an appeal was taken and judgment rendered as alleged.

Petitioner further says that at the aforesaid hearing upon his application on November 3, 1920, the sole and only question that was argued and considered by this Honorable Court was the jurisdic- [fol. 20] tional question as to the right of the Department of Labor to try and order the deportation of petitioner by departmental proceedings solely, under the alleged authority of the Immigration Act of 1917, and that the sole question considered by this Honorable Court was the jurisdictional question and that no record of the departmental proceedings except the warrants of arrest and orders of deportation were introduced for consideration by this Honorable Court, there being no record of the evidence and conclusions from such by the departmental authorities at any time considered by this Honorable Court.

This petitioner further says that the question as to the fairness of the hearing before the Department of Labor of this petitioner and the correctness of the conclusions of law drawn from the facts before said department and the manner in which said hearings before said department were conducted were never considered by this or any other court at any time and that these questions are raised for determination by the present application of this petitioner.

This petitioner further says that the question as to the right of the Department of Labor to seize and take possession of alleged papers and letters belonging to this petitioner from his possession has not been raised as an issue at any time in any proceeding and is now presented for the first time by this petitioner to this Honorable Court.

This petitioner further says that the consideration of his application for a writ of habeas corpus in former proceedings and his discharge under the first application were directed only to the jurisdictional question and the right of the Department of Labor to exercise jurisdiction and solely try and determine the right of this petitioner to be and remain in the United States.

Further replying this petitioner denies each and every other allegation in the respondent's Amended Return save and except such as are admissions of allegations contained in petitioner's petition and save such as are herein expressly admitted to be true.

This petitioner further avers that the hearing before the Department of Labor was arbitrary, unjust and unfair in the *manners* set forth in his petition; that the seizure of papers and letters alleged to belong to him and seized as a basis for the order of deportation was contrary and in violation of the constitution of the United States and that the conclusions of the Department were unwarranted and [fol. 21] not according to law and that there was no evidence upon which to base an order of deportation before the Department of Labor.

Wherefore petitioner prays that the hearing and record before this Honorable Court may be fairly determined and that he may be

discharged from custody and for all other and further relief which by reason of the premises he may be entitled to.

Wm. J. Dawley, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by Wong Doo omitted in printing.

In United States District Court

Hearing on Amended Return—Entered Sept. 26, 1922, by D. C. Westenhaver, Judge

This day this cause came on to be heard on the amended return and was argued by counsel, submitted to the Court and taken under advisement by the Court.

In United States District Court

[fol. 22] Opinion of Court—Filed Oct. 6, 1922

Westenhaver, *District Judge:* This case presents the same history and involves the same issues and questions of law as were involved in Wong Sun vs. J. A. Fluckey, No. 11569, this day decided. The writ of habeas corpus is denied and the defendant is remanded into custody, for the reasons therein stated.

D. C. Westenhaver, Judge.

October 6, 1922.

In United States District Court

Order Denying Writ of Habeas Corpus—Entered October 6, 1922, by D. C. Westenhaver, Judge

This day this cause having been submitted to the Court on a previous term, on application for a writ of habeas corpus, on consideration thereof the Court denied said application and orders that the petition be dismissed at the costs of the petitioner, and that the said petitioner be remanded into the custody of J. Arthur Fluckey, Inspector in Charge of the Bureau of Immigration, at Cleveland, Ohio, for further disposition, and an exception is allowed.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND WAIVER—Filed Oct. 10, 1922

To the Honorable Judge D. C. Westenhaver and to the Clerk of the United States District Court and the Honorable E. S. Wertz, United States Attorney:

You will take notice that the petitioner in the above entitled case hereby appeals to the United States Circuit Court of Appeals for [fol. 23] the Sixth Circuit of the United States of America on the order, judgment and decree entered herein on the 6th day of October, 1922, dismissing the application for a writ of habeas corpus hereinbefore filed and declaring the petitioner to be unlawfully within the United States and ordering his deportation according to the law and in pursuance with the order of the Acting Secretary of the Department of Labor as more fully appears in the assignment of errors filed herein.

Wm. J. Dawley, Attorney for Petitioner.

Receipt of copy of above acknowledged 10/9/22.
B. W. Henderson, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Oct. 10, 1922

To the Honorable District Court of the United States for the Northern District of Ohio, Eastern Division:

The above named Wong Doo, petitioner, conceiving himself aggrieved by the decree, judgment and order made and entered on the 6th day of October, 1922, in the above entitled cause, does hereby appeal from said decree, judgment and order to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in said assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree, judgment and order were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Wm. J. Dawley, Attorney for Petitioner.

[fol. 24] In United States District Court

Assignment of Errors—Filed Oct. 10, 1922

To the Honorable District Court of the United States for the Northern District of Ohio, Eastern Division:

The petitioner in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon the application for a writ of habeas corpus and the refusal of the same upon consideration thereof by this Court, to-wit:

1. That the Court erred in holding the doctrine of res adjudicata required the Court to deny as a matter of law the present application and refusing to consider the same although the grounds set forth and relied upon in the present application have never been considered in any other hearing and were sufficient to require the discharge of the petitioner.

2. That the judgment of the Court is contrary to law in that the application showed conclusive reasons for granting the same.

3. That the refusal of the application was manifestly error as appears from the record.

4. That there are errors of law apparent upon the record.

5. That the Court erred in not sustaining the right of the defendant in discharge.

Wm. J. Dawley, Attorney for Petitioner.

In United States District Court

Order Allowing Appeal—Entered Oct. 10, 1922, by D. C. Westenhaver, Judge

This day came the petitioner and presented his petition for appeal, together with the assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows and orders an appeal in this case to the United States Circuit Court of Appeals for the Sixth Circuit; and it is further ordered that the petitioner give bond according to law, to the approval of the Clerk of this Court, in the sum of $250.00.

[fols. 25 & 26] Bond on Appeal for $250.00—Approved by Westenhaver, J.; omitted in printing

[fols. 27 & 28] CITATION IN USUAL FORM SHOWING SERVICE ON B. W. HENDERSON—Omitted in printing

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[fol. 29] IN UNITED STATES DISTRICT COURT

STIPULATION WITH REGARD TO RECORD ON APPEAL—Filed Oct. 30, 1922

To the Honorable the District Court of the United States for the Northern District of Ohio:

Whereas, in all of the above causes there is only one record of the Immigration Department of the hearings and exhibits relating to the deportation proceedings against the above named petitioners, and

Whereas, the facts and law in all of the above cases are in most respects similar and the cases were consolidated for hearing before the United States District Court.

It is hereby stipulated by counsel for the above named petitioners and by counsel for the respondent as follows:

That the incomplete record of the departmental hearing marked Plaintiff's Exhibit A and made by reference a part of the petition of each of the applicants may be omitted from each of the cases:

That the complete departmental record may be withdrawn from the files of the United States District Court and forwarded to the Clerk of the United States Court of Appeals for the Sixth Circuit as Government's Exhibit D for use at the hearing of these cases in said Circuit Court of Appeals.

That the court's opinion in the cases may be printed in the record in one of the cases and incorporated by reference in the records of the other cases in the United States Circuit Court of Appeals for the Sixth Circuit.

It is further stipulated that the cases may be consolidated for hearing in the Court of Appeals and that briefs in any one of the cases may be used and considered as briefs in each and all of the cases and as a compliance with the rules thereto relating.

Wm. J. Dawley, Counsel for Appellants. Berkeley W Henderson, Asst. U. S. Atty., Counsel for Appellees.

[fol. 30] IN UNITED STATES DISTRICT COURT

ORDER WITHDRAWING EXHIBITS—Entered Oct. 30, 1922, by Judge Westenhaver

It appearing to the Court that plaintiff's Exhibit A is an incomplete record of the hearings in the above entitled cases before the Immigration Department and it further appearing that the com-

plete record, by agreement of counsel, can be certified as a substitute for plaintiff's Exhibit A to the Circuit Court of Appeals, it is ordered by the Court that the complete record be withdrawn from the files of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit as Government's Exhibit D, with the transcript of record in these cases, for use at the hearing of these cases in said Circuit Court of Appeals.

It further appearing to the Court that defendant's Exhibit C, being the record of the United States Circuit Court of Appeals for the Sixth Circuit, cannot be conveniently duplicated, it is ordered by the Court that said exhibit be withdrawn from the files of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, with a transcript of record in these cases, for use at the hearing of these cases in said Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed Oct. 30, 1922

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the appellate court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

Wm. J. Dawley, Attorney for Plaintiff. Berkeley W. Henderson, Attorney for Defendant.

[fols. 31 & 32] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Oct. 30, 1922

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Application for Writ of Habeas Corpus.
Order Allowing Writ of Habeas Corpus.
Writ of Habeas Corpus.
Return.
Hearing on Application.
Hearing on Application for Leave to File Amended Return.
Amended Return of Immigration Inspector.
Leave to File Reply.
Reply.
Hearing on Amended Return.

Exhibits except Plaintiff's Exhibit A and Defendant's Exhibit C.
Memorandum Opinion (See Wong Sun case No. 11569).
Final Decree.
Notice of Appeal.
Petition for Appeal.
Assignment of Errors.
Order Allowing Appeal.
Bond on Appeal.
Citation.
Stipulation with regard to record. (See case No. 11569.)
Order withdrawing certain Exhibits. (See case No. 11569.)
Stipulation re printing of record.
Precipe for Transcript.
Certificate.

And deliver all papers to The Gates Legal Publishing Company for printing.

Wm. J. Dawley, Attorney for Petitioner.

[fol. 33] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF CLERK

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing printed pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the precipe for transcript filed herein, the originals of which, except certain exhibits withdrawn by leave of Court, remain in my custody as Clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said District, this 10th day of November, A. D., 1922, and in the 147th year of the Independence of the United States of America.

B. C. Miller, Clerk, by M. E. Bauman, Deputy Clerk. (Seal.)

[fol. 34] Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit

APPEARANCE OF COUNSEL—Filed Nov. 14, 1922

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Appellant.

W. J. Dawley, 1208 Engineers Bldg., Cleveland, O.

CAUSE ARGUED AND SUBMITTED—OCTOBER 8, 1923—BEFORE KNAPPEN, DENISON AND DONAHUE, C. J. J.

These causes are argued by Mr. William J. Dawley, for the Appellants and by Mr. M. A. McCormack, Assistant United States Attorney, for the Appellee and are submitted to the Court.

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Filed Nov. 12, 1923

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed Nov. 12, 1923

[fol. 36] KNAPPEN, Circuit Judge: The four appellants, all of whom are of Chinese descent and none of whom claim United States citizenship, were arrested in August, 1915, as Chinese aliens unlawfully within the United States and, as claimed by the Commissioner, thus subject to deportation under the Immigration Act of 1907 (34 Stat. 898). Under habeas corpus proceedings, they were discharged, conformably to the decision in United States v. Woo Jan (245 U. S. 552), because entitled to a judicial hearing, as distinguished from a summary or administrative method. They were thereupon re-arrested for deportation, under the general Immigration Act of 1917 (39 Stat. 874; Comp. St. Ann. Supp. 1919, sections 4289¼a-4289¼u). Proceedings in habeas corpus, hereupon instituted by appellants, were dismissed by the district court, whose action was affirmed by this court (Woo Shing v. United States, 282 [fol. 37] Fed. 498), upon the authority of Ng Fung Ho v. White, Commissioner, 259 U. S. 276, wherein it was held that Sec. 19 of the Immigration Act of 1917 did not preserve the right to a judicial hearing in respect to deportation after May 1, 1917, of Chinese found here, or who shall have entered, in violation of the exclusion acts. Appellants thereupon severally instituted in the district court

below new proceedings in habeas corpus, attacking the deportation order upon various charges of unfairness and irregularity in the departmental hearing awarded, and challenging the sufficiency of the evidence to sustain the findings made. By his return to the writ of habeas corpus the inspector not only traversed the allegations of the petition relative to asserted insufficiency of proof and unfairness and lack of impartiality of the proceedings on the administrative hearing, but invoked the dismissal by the district court of the former proceeding in habeas corpus, and the affirmance of that action by this court, as a bar to the present proceeding. Judge Westenhaver discharged the writs of habeas corpus, and ordered petitioners remanded into the custody of the immigration authorities, upon the ground that the previous discharge of the writs by the district court, and the affirmance thereof by this court, work a final adjudication of petitioners liability to deportation. Wong Sun v. Fluckey, Inspector, 283 Fed. 989. These appeals are from the respective orders discharging the writs.

Appellants contend, first, that the doctrine of res judicata does not apply to an order discharging the writ of habeas corpus, and, second, that in the former proceeding the sufficiency of the hearing before the immigration officer and the conclusions there reached were not considered by either the district court or this court.

The former petition for habeas corpus, the proceedings in which were so dismissed by the district court, and whose action was affirmed by this court (282 Fed. 498), not only asserted and relied upon the denial to petitioner of a judicial hearing, respecting his right to remain in the United States, but also, in the language quoted in the [fol. 38] margin,[1] directly attacked the sufficiency of the administrative hearing actually had as unfair and not impartial to the petitioner.

The inspector's return to the writ, in the case of each appellant, not only denied petitioner's right to a judicial hearing, but, in the language we have set forth in the margin,[2] joined issue upon the allegations of the petition regarding the character of the adminis-

[1] "Your petitioner further alleges that said so-called hearing conducted before said J. Arthur Fluckey, inspector in charge of the Immigration Department, Cleveland District, was manifestly unfair and not impartial to this petitioner, but on the contrary was examined on several occassions by said J. Arthur Fluckey and his assistants without the privilege of counsel and found by said Fluckey to be unlawfully in the United States, solely from the testimony of witnesses, cross-examination of whom was not had by your petitioner's counsel."

[2] "Your respondent alleges that such a hearing was duly had and opportunity was given the petitioner to show cause why he should not be deported in view of the facts proved; and said petitioner was represented by counsel in said hearing; that the petitioner was given full opportunity to produce the evidence which he desired to produce; that there was no abuse of the discretion lodged by law in the Secretary of Labor; that said hearing was had in accordance with law and in accordance with the regulations of the Department of Labor. Your respondent denies each and every allegation of the petition with the exception of that which has been specifically admitted and alleges that said petitioner is now held in lawful custody, etc."

trative hearing had. While petitioner's charges in that respect were not as definite and detailed as in the application before us, they were sufficient, especially in view of the issue joined, to permit proof thereof and decision thereon. It is true that, in the former proceeding, the sufficiency of the hearing before the Immigration Officer, and the conclusions there reached, were not considered by the district court, nor, at least substantially, by this court, but that was because proof in support of petitioner's allegations in those respects was not presented.[3] But it is a common-place that in ordinary judicial proceedings the final determination of the court is a conclusive adjudication not only as to matters actually argued and decided, but also as to all matters which might have been so considered and decided. New Orleans v. Citizens Bank, 167 U. S. 371, 397; So. Pacific R. R. Co. v. United States, 168 U. S. 1, 48.

At the common law a refusal to discharge on habeas corpus one in custody on a criminal charge was no bar to further and repeated applications of the same nature, even upon the identical grounds existing or alleged on the first application. The prominent considerations leading to this state of the law seem to have been that a proceeding by habeas corpus—which was the "writ of freedom"—is purely summary, without provision for framing or trying issues of fact (the officer's return to the writ being taken as true), [fol. 39] and without right of review. Today, generally, and in the federal courts specifically, the hearing in court of a petition for habeas corpus is essentially a judicial proceeding, involving a trial of the truth of the officer's return when challenged on the facts, and hearing on the questions of law involved, with a right of review by an appellate court (United States v. Fowkes, C. C. A. 3, 53 Fed. 15; In re Graves, C. C. A. 1, 270 Fed. 181), not merely by writ of error, but by appeal, bringing up for review on both law and facts the entire record presented to the court below. In re Neagle, 135 U. S. 1, 41-42. As a practical proposition, the basis for the old common-law rule has thus disappeared.

On the question of res judicata, as involved here, we find no decisions of the Supreme Court of the United States in point. In re Jugiro, 140 U. S. 291, cited by appellant, the appeal was from a denial by the federal circuit court of a second application for habeas corpus, made after the affirmance by the Supreme Court of a former denial by the circuit court, with remand of petitioner to the state court. The second petition presented a matter occurring after the affirmance by the Supreme Court, also several other matters of which petitioner claimed to have been ignorant when the first application

[3] We of course accept as correct the statement of counsel for appellants that the course taken upon the previous application was followed because of differing interpretations by the United States courts of the jurisdiction of the Immigration Department under the Act of 1917, and for economical reasons as well, and in the belief that the Immigration Department did not have jurisdiction. For purposes of this hearing, we disregard the comments (partly obiter) made in the concluding paragraph of our opinion on review of the former application (282 Fed., at p. 502), upon the departmental record therein referred to.

was made. The Supreme Court held that the matter later occurring did not render the action of the state court void, and that the other errors alleged could not be reached by habeas corpus. There was thus no second hearing of any question once decided, or that might have been decided, and the question of res judicata was not raised or presented, nor was there room therefor.

In Rose v. Roberts (C. C. A. 2), 99 Fed. 948, an order of the circuit court dismissing the writ of habeas corpus had been affirmed upon the holding that the judgment of a court martial can not be reviewed by a writ of habeas corpus, except to determine the question of jurisdiction, which was found to extend to the action of the court martial. In Carter v. McClaughry, 105 Fed. 614, the Circuit Court for the District of Kansas held, as applied to the above stated action of the Circuit Court for the Southern District of New York and of the Court of Appeals for the Second Circuit, that the denial of a writ of habeas corpus by the federal courts of one circuit does not render questions determined res judicata, so as to preclude their re-examination by the courts of another circuit in subsequent habeas [fol. 40] corpus proceedings instituted therein by the same petitioner. The Supreme Court, in dismissing an attempted review of the judgment of the Circuit Court for the Southern District of New York, did not pass upon the questions of fact and the validity of the conviction and sentence, but held merely that the Supreme Court would not entertain a direct appeal therefrom. 177 U. S. 496. The affirmance by the Supreme Court (183 U. S. 365) of the action of the District Court of Kansas did not involve or consider the question of res judicata, which manifestly could not arise in the case.

We therefore see no basis for the suggestion that the Supreme Court, by its action in either of the cases cited, impliedly recognized the right of repeated review.

We think the same is true of Chin Fong v. White, C. C. A. 9, 258 Fed. 849, also cited by appellant, in support of his denial of the doctrine of res judicata. The first application for habeas corpus involved the contention that the construction of a treaty was involved. Ex parte Chin Fong, 213 Fed. 288. An appeal to the Supreme Court was dismissed on the ground that appellant's rights depended upon the statutes regulating Chinese immigration and not upon a construction of treaty provisions; and that there was thus no right of direct appeal from the District Court to the Supreme Court. Chin Fong v. Backus, 241 U. S. 1. The District Court then granted appellant permission to file a new petition for habeas corpus, basing his claim to relief upon his alleged statutory rights, and not upon claimed treaty rights. Chin Fong v. White, supra, was a review of the order made under the second proposition. No question of res judicata was thus necessarily involved.

Elsewhere in the federal courts the trend of decision seems to favor the rule of res judicata when the right of review exists. In Ex parte Kaine, 3 Blatchf. 1; Fed. Case No. 7957, 14 Fed. Cas. 78; and in In re Kaine, 14 Fed. Cas. 82, No. 7597a, the decision denying the bar of former adjudication was rendered before any review of

an order in a habeas corpus case was permitted. The decision was based solely on the common-law rule as it stood at the time of the adoption of the Constitution of the United States.

In In re Kopel, 148 Fed. 505, Judge Hough entertained a petition in habeas corpus (an extradition case) notwithstanding a previous denial by a justice of the Supreme Court of the state, from whose decision, as stated by Judge Hough, "no appeal seems to have been [fol. 41] taken, if such appeal be permissible," Judge Hough basing his conclusion upon the absence of federal statute limiting the right of successive petitions. It does not appear what the decision would have been had the New York practice permitted an appeal, or if the prior dismissal had been made by the same federal court. The case was not reviewed. In United States v. Chung Shee, C. C. A. 9, 76 Fed. 951, a judgment of the District Court, discharging on habeas corpus a Chinese immigrant detained for deportation, as not entitled to enter was held conclusive of the right of entry, and not subject to re-examination by subsequent proceedings for deportation; and this decision has recently been followed by District Judge Neterer in Ex parte Gagliardi, 284 Fed. 190.[4]

In Ex parte Cuddy, 40 Fed. 62, Mr. Justice Field, sitting at the circuit, in dismissing a writ of habeas corpus and remanding the prisoner, held, as stated in the headnote, that "where a petitioner for a writ of habeas corpus appeals to the United States Supreme Court from a judgment of the Circuit Court denying his application, voluntarily omitting a material portion of his case, he can not, after failing on the appeal upon the record presented, renew his application before another court or justice of the United States, upon the same record, with the addition of the matter thus omitted, without first having obtained leave for that purpose from the Supreme Court. The question is entirely different when subsequently occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration." In Ex parte Moebus, 148 Fed. 39, 40-41, the late Circuit Judge Putnam held, as stated in the headnote, that "in jurisdictions where appeals have been provided for in habeas corpus cases, it has come to be the rule, either as one of law or of practical administration, that a judge is not required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his remedy by appeal"; while in Lui Lum v. United States, C. C. A. 3, 166 Fed. 106, an order of a United States District Judge of New York, denying the right to a discharge, was expressly held res judicata as to a subsequent application in habeas corpus to a District Judge in Pennsylvania.

[fol. 42] In the state courts a contrariety of decision is found. Among the cases denying the conclusiveness of former adjudication

[4] In the Chung Shee case the district court (71 Fed. 279) had distinguished, as to the applicability of res judicata, between an order remanding and an order discharging the petitioner; but this distinction is not mentioned in the decision of the Circuit Court of Appeals, which on its face would apply equally to a decision against the petitioner's right.

are Bradley v. Beetle, 153 Mass. 154;[5] Miskimmins v. Shepard, 8 Wyo. 392, 404;[6] People v. Brady, 56 N. Y. 183, 191-2;[7] Weir v. Marley (Mo.), 6 L. R. A. 672, 674.[8] In People v. Siman, 284 Ill. 28, it is said that there is no statutory review of an order refusing to discharge on habeas corpus. In re Leutzler v. Perry, 18 O. C. C. 826, where it was held that an order by a judge refusing to issue a writ of habeas corpus (not an order discharging the writ after hearing) was not res judicata as to a second application to another court, attention was called to the facts that the Ohio statute did not authorize review of an order refusing to issue the writ, but only of an order discharging the writ upon a hearing, and that even in the latter case the permissible review, being only by writ of error, without provision for bringing to the attention of the reviewing court the real facts upon which petitioner claimed to be entitled to his discharge, was not a full, complete and adequate remedy in all cases. The Circuit Court decision in the Luetzler case does not seem to have been reviewed.

Among the decisions affirming the conclusiveness of a former adjudication are State v. Whitcher, 117 Wis. 668;[9] State v. Hebert, 127 Tenn. 220, 245;[10] Perry v. McLinden, 62 Ga. 598, 603;[11] Ex [fol. 43] parte Justus, 26 Okla. 101.[12]

The text books cited are generally not inconsistent with the ex-

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[5] This case holds that a former discharge is not "as matter of law, a bar to subsequent proceedings of the same kind founded on the same facts." The question whether the court on the second application has discretion to hear or refuse to hear a new application on the same facts was not passed upon.

[6] This decision seems to be based in part upon the Wyoming statute, as being inconsistent with the idea that a former denial of the writ is a final adjudication.

[7] It does not appear whether or not the statute provided for an appeal. In at least three states besides Wyoming, statutes govern the practice of subsequent applications for habeas corpus. In re Udell, 171 Ga. 599; Ex parte Hamilton, 65 Miss. 98; Ex parte Rossan (Texas), 5 So. W. Rep. 666.

[8] It is said that "the serious objection to the conclusiveness of a judgment of habeas corpus in such causes [custody of children] would be removed by a provision for review by appeal or writ of error."

[9] This case holds that in view of the statute giving a right of appeal, the decision upon the application is res judicata to be set aside by some subsequent proceeding in the same matter, according to the legal procedure for reviewing judicial errors.

[10] The right to a second application for habeas corpus, after affirmance by the Supreme Court of an order of discharge, was limited by that court to cases where new and vitally material facts have developed after the decision of the Supreme Court, which were unknown to petitioner and could not have been discovered by the exercise of reasonable diligence, and which would have deterred the court from dismissing the petition had they been known and presented to the court.

[11] Perry v. McLinden, supra, holds a refusal to discharge a prisoner res judicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not,—especially where the imprisonment is on civil process; this holding being based on the existence of right of review.

[12] It was said that "while the order of the Criminal Court of Appeals denying the writ is not a bar to a further application to this court, still its order made in the premises is entitled to consideration, and it appearing that the conclusion reached is correct, it will be followed by this court."

istence of res judicata where there is statutory provision for review. The citation of Foster's Federal Practice does not in terms cover cases of statutory appeal and affirmance thereunder. Brown on Jurisdiction, Sec. 111, states that "the doctrine of res judicata has no application to this proceedings [habeas corpus] except where the statute provides for an appeal, which is the case in some states." Bailey on Habeas Corpus, Sec. 59, says: "Where, however, a statute exists which authorized a review of the proceedings upon appeal or writ of error, the determination being held res adjudicata, it would follow that it would constitute a bar to the prosecution of such action" (false imprisonment for the same cause).

In this state of the law, and regardless of decisions asserting the doctrine of res judicata as applied to the right to custody of children or insane persons[13] (Cormack v. Marshall, 211 Ill. 519; McMahon v. Meade, 30 S. D. 515; In re Holt, 34 Cal. App. 290), and in view of the federal statute providing for appeal, the fact of appeal and affirmance thereunder, and that the second application presents no considerations unknown to appellants or which could not have been presented upon the first application, and without reference to the fact that our consent to the second application was not obtained or requested,[14] we are constrained to hold that the final judgment upon the previous application for habeas corpus constituted a conclusive bar to the second application. We think this conclusion supported by both reason and the weight of authority.

The orders of the District Court discharging the respective writs of habeas corpus are affirmed.

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed Dec. 11th, 1923

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes the appellant, Wong Doo, and moves this Honorable Court for an order staying the mandate of the Circuit Court of Appeals in this cause until and including the 12th day of January, 1924, and for his reasons says that his counsel are preparing a petition for writ of certiorari which they intend to file in the Supreme Court of the United States, to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit, filed in the above entitled cause, and for the further reason that counsel intend to make application to this Honorable Court for leave

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[13] Such cases are not entirely destitute of analogy to deportation proceedings, as involving a status other than an imprisonment for an offense.

[14] Compare Raydure v. Lindley—C. C. A. 6—268 Fed. 338, 340; and other cases cited in Amer. Foundry, Etc., Co. v. Wadsworth—C. C. A. 6—290 Fed., at p. 196.

to file an application for a writ of habeas corpus submitting therewith his brief.

Respectfully submitted, W. J. Dawley, Counsel for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS

BRIEF

Counsel in support of the foregoing motion desire to state that [fol. 45] they have not sufficient time within which to prepare a petition for certiorari and brief unless this stay is granted, and that the purpose is not to unduly postpone the date of departure of this appellant under the order of deportation, but to present what counsel consider to be a just and meritorious contention before the United States Supreme Court upon a question of law that is decided differently in different jurisdictions of the United States, and that has not been finally determined by the United States Supreme Court.

Counsel also desires to state that they are of opinion, if the departmental record were considered, this appellant would be entitled to a discharge from custody by virtue of a former decision of this court pertaining to the status of merchants and sons of merchants of the Chinese race, who, after they are domiciled in this country, are compelled by force of circumstances to temporarily engage in the occupation of a laborer instead of continuing that of a merchant.

It is submitted that the delay so far caused in this litigation has been due more to the unsettled state of the law regarding jurisdiction of the department of labor and not to any wilful act of counsel for this Chinaman.

Respectfully submitted, W. J. Dawley, Counsel for Appellant.

[fol. 46] UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed Dec. 12, 1923

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari, is hereby granted subject to the following condition: that appellant shall within 30 days from the date of this order file his petition for the writ in the Supreme Court and, upon giving notice to opposing counsel of date for submission as required by Supreme Court Rule 37, present the petition in open court on the first motion day thereafter and within five days after the first motion day following the expiration of said 30 day period, file in this court proof of such filing, notice and presentation of petition. Unless this condition is complied with or its non-observance sanctioned by the Supreme Court, the mandate herein will issue either upon the court's own motion and without notice, or on motion of opposing party upon notice, as to the court

may seem best; but in the event of compliance with the condition imposed or of such sanctioned non-observance the mandate will be stayed until final action in the case is taken by the Supreme Court.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLERK'S CERTIFICATE

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of transcript of record and proceedings in the case of Wong Doo, vs. United States of America, No. 3832, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 4th day of January, A. D. 1924.

Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 48] SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

February 18, 1924.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Sixth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

It is further ordered that this cause be, and the same is hereby, placed on the summary docket and assigned for argument on Monday, April 7th next, after the cases heretofore assigned for that day.